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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT
OF THE UNITED STATES

ASSOCIATION OF CIVILIAN TECHNICIANS,
NEW YORK STATE COUNCIL,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the court of appeals have jurisdiction to review a Federal Labor Relations Authority order holding that a union presenting statutory unfair labor practice claims through grievance arbitration has no right to decision of the merits unless the accused employer consents?

CORPORATE DISCLOSURE STATEMENT

Petitioner is part of the Association of Civilian Technicians, Inc. The corporation has no parent corporations. The corporation has issued no stock. Consequently, no publicly held company owns any.

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OPINIONS AND ORDERS

The decision below, App. 1a, is reported at 507 F.3d 697. The dissenting opinion, App. 9a, is reported at 507 F.3d 701. The denials of rehearing and rehearing en banc, App. 84a-85a, are unreported. The initial decision of the Federal Labor Relations Authority (FLRA or Authority), App. 36a, is reported at 60 FLRA 890. The Authority's denial of reconsideration, App. 24a, is reported at 61 FLRA 664. The arbitrator's decision, App. 46a, is unreported.

JURISDICTION

The judgment sought to be reviewed was entered October 26, 2007. The court below denied rehearing and rehearing en banc January 18, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

5 U.S.C. § 7103(a) (excerpt)

For the purpose of this chapter—

* * *

(9) "grievance" means any complaint . . . by any employee labor organization . . . concerning . . . a claim of breach[] of a collective bargaining agreement[] or . . . any claimed violation, misinterpretation, or misapplication of any law . . . affecting conditions of employment.

5 U.S.C. § 7116(d) (excerpt)

[I]ssues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

5 U.S.C. § 7121 (excerpt)

(a)(1) . . . [A]ny collective bargaining agreement shall provide procedures for settlement of grievances, including questions of arbitrability. . . . [T]he procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

* * *

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

* * *

(C) include procedures that—

* * *

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

5 U.S.C. § 7122 (excerpt)

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award . . . . If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by

Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

5 U.S.C. § 7123 (excerpt)

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 711[6][1] of this title

* * *

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order . . . in the United States Court of Appeals for the District of Columbia.

* * *

(c) Upon the filing of a petition under subsection (a) of this section for judicial review . . . the court . . . shall have jurisdiction of the proceeding and of the question determined therein and may . . . enter a decree . . . setting aside in whole or in part the

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[1] *See Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 64 (D.C. Cir. 1987) (indicating that reference to "§ 7118" in § 7123(a)(1) should be to § 7116).

order of the Authority. . . . Review of the Authority's order shall be on the record in accordance with section 706 of this title.

STATEMENT OF THE CASE

Petitioner, a federal employee labor union, invoked arbitration of a grievance and presented both contractual claims under the collective bargaining agreement and statutory unfair labor practice (ULP) claims. The arbitrator acknowledged that the union presented ULP claims, App. 65a-66a, but failed to decide them. The arbitrator rejected the union's contractual claims and denied all relief. App. 83a.

The union appealed to the FLRA, arguing that the arbitrator's failure to decide the ULP claims was contrary to law. The Authority denied the appeal on the ground that, absent written stipulation by the employer, the union had no right to decision of these claims. App. 26a.

The union filed in the court below a petition for review. The court had jurisdiction under 5 U.S.C. § 7123(a)(1). The court, however, Judge Tatel dissenting, held that it lacked jurisdiction. In the majority's view, the FLRA's order did not "involve[] an unfair labor practice" within the meaning of § 7123(a)(1). App. 9a.

ARGUMENT

I

The decision below contradicts previous opinions of the same court and is incompatible with the standard announced by the Ninth Circuit

In *United States Dep't of Interior v. FLRA*, 26 F.3d 179 (D.C. Cir. 1994), the court said, "[i]f the aggrieved party chose to go the grievance procedure route, but characterized its claim as a statutory unfair labor practice, judicial review certainly would be available." 26 F.3d at 183. As Judge Tatel observed, this point is "directly applicable to this case yet absent from the court's opinion." App. 13a.

"[A]lso conspicuously absent from the court's opinion," Judge Tatel noted, was "the standard from then-Judge Kennedy's opinion in *U.S. Marshals Service v. FLRA*, 708 F.2d 1417, 1420 (9th Cir. 1983)." App. 15a. This standard, previously adopted by the D.C. Circuit and "repeated in every subsequent case presenting this jurisdictional question," states that the court of appeals has jurisdiction if the Authority's order "necessarily implicates" an unfair labor practice claim. App. 13a, *citing Overseas Educ. Ass'n v. FLRA v. FLRA*, 824 F.2d 61, 68 (D.C. Cir. 1987).

In *Marshals Service*, no ULP claim was implicated because the union had presented only contractual claims and the FLRA order challenged

by the employer afforded relief solely on those claims. Here, the union raised statutory ULP claims as well as contractual claims and obtained no relief at all. As Judge Tatel said, "the Authority's order 'necessarily implicated' the union's unfair labor practice claim by effectively terminating it," rendering it "irretrievably lost." App. 15a-16a.

II

The question is important

The decision below denies jurisdiction where an arbitrator and the Authority refuse relief and simply ignore ULP claims. Further, the Authority's order allows an arbitrator to ignore these statutory claims unless the accused wrongdoer stipulates otherwise. This grant of power to a law violator to veto an aggrieved party's right to relief is incompatible with law and norms of justice.

Under the legal framework, *supra* at 1-4, a union has a right to grieve ULP claims, and the grievance procedure must be able to resolve grievances and must grant the union a unilateral right to binding arbitration of any grievance not settled. The statute provides for appeal of arbitration awards to the Authority and for direct appellate review of Authority orders that involve ULP claims.

The decision below and the Authority's order erroneously transform this congressionally mandated road to judicial relief into a path that

can be blocked at the whim of the wrongdoer and the arbitrator.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 24, 2007 — Decided October 26, 2007

No. 06-1354

ASSOCIATION OF CIVILIAN TECHNICIANS, NEW YORK STATE COUNCIL, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

On Petition for Review of an Order of the Federal Labor Relations Authority

Daniel M. Schember argued the cause and filed the briefs for petitioner.

James F. Blandford, Attorney, Federal Labor Relations Authority, argued the cause for respondent. With him on the brief was *William R. Tobey*, Deputy Solicitor.

Before: SENTELLE, TATEL and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Dissenting opinion filed by *Circuit Judge* TATEL.

SENTELLE, *Circuit Judge*: The Association of Civilian Technicians, New York State Council ("the Union" or "the Association"), petitions for review of an order of the Federal Labor Relations Authority stemming from a grievance filed by the Union after the New York Division of Military and Naval Affairs implemented a state-wide smoking ban at its facilities. The parties could not resolve the grievance, so the Union submitted it to binding arbitration in accordance with the terms of its collective bargaining agreement and the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.* The arbitrator denied the grievance and the Union filed exceptions to her award with the Authority. The Authority denied the exceptions in the order at issue here. Because we find that we lack jurisdiction to review the Authority's order, we dismiss.

I. Background

In 2003, New York amended its Clean Indoor Air Act to prohibit indoor smoking in all "places of employment," including workplaces of "the legislative, executive and judicial branches of state government and any political subdivision of the state." N.Y. Pub. Health Law § 1399-o(1), -n(2). Accordingly, the New York Division of Military and Naval Affairs ("DMNA") issued a new smoking policy that prohibited all smoking in National Guard facilities in New York.

The Association of Civilian Technicians, New York State Council, which represents the civil technicians working at the Guard facilities, filed a grievance charging that the DMNA had violated their collective bargaining agreement by failing to negotiate the terms of the new smoking policy. When the grievance was not resolved, the Union invoked its right to binding arbitration and added an allegation that DMNA's unilateral implementation of the policy constituted an unfair labor practice because it was taken in clear and patent breach of the collective bargaining agreement's negotiation provisions.

The parties were unable to stipulate to the issues before the arbitrator. She reviewed their proposed issues and found that, "[a]t the heart of this case is a dispute over the interpretation and application of the language of the Parties' Collective Bargaining Agreement." She then framed the issues as "Did the Agency violate the Collective Bargaining Agreement when it issued a new smoking policy letter on 23 July 2003?" and "If so, what should the remedy be?" She concluded that the DMNA had not violated the collective bargaining agreement because the smoking ban was a statutory requirement and therefore did not fall within the agreement's requirement that rules "within the purview" of the DMNA be negotiated.

The Union filed exceptions to the arbitral decision with the Federal Labor Relations Authority arguing, in pertinent part, that the arbitrator exceeded her authority when she failed

to address its unfair labor practice allegations. The Authority denied the Union's exceptions, finding that the arbitrator had not erred in framing the issues as arising solely under the collective bargaining agreement. Under Authority precedent, where parties do not stipulate to the issues before the arbitrator, the arbitrator has broad discretion to frame the issues. *Ass'n of Civilian Technicians, N.Y. State Council*, 60 F.L.R.A. 890 (2005), *recons. denied*, 61 F.L.R.A. No. 134 (2006) (citing *AFGE, Local 1367*, 60 F.L.R.A. 187, 190 (2004)). Therefore, in this case, because there was no stipulation that an unfair labor practice claim was before the arbitrator, the arbitrator was not obligated to frame the issues as including an unfair labor practice claim. *Id.* The Authority deferred to the arbitrator's framing of the issues and dismissed all exceptions to her award. *Id.* The Union sought reconsideration, which was denied, then petitioned for review by this Court.

II. Analysis

We lack jurisdiction to review the Authority's order affirming the arbitral decision because it does not "involve[] an unfair labor practice under section 711[6]" of the Federal Service Labor-Management Relations Statute. 5 U.S.C. § 7123(a)(1).* The

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* Although the statute refers to "section 7118," the reference "has been recognized to be an error; the correct reference is to section 7116." *AFGE, Local 2510 v. FLRA*, 453 F.3d 500, 502 n.* (D.C. Cir. 2006) (quoting *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 63 n.2 (D.C. Cir. 1987) ("*OEA*")).

Authority's order instead involves rules applicable to arbitration which, when applied in this dispute, resulted in the unfair labor practice claim's exclusion from review. We find that this secondary effect on the unfair labor practice claim is not sufficient to qualify the order as one that "involves an unfair labor practice" for purposes of 5 U.S.C. § 7123(a)(1).

The Federal Service Labor-Management Relations Statute limits our review to orders of the Authority which involve unfair labor practices in order to balance a "strong Congressional policy favoring arbitration of labor disputes," *Overseas Educ. Ass'n*, 824 F.2d 61, 63 (D.C. Cir. 1987), with a Congressional intent for "uniformity in the case law concerning unfair labor practices," *AFGE, Local 2510 v. FLRA*, 453 F.3d 500, 505 (D.C. Cir. 2006). The Statute contains a "two-track system for resolving labor disputes." *OEA*, 824 F.2d at 62. A party aggrieved by an unfair labor practice may go down either track, but not both. 5 U.S.C. § 7116(d). Under the first track, not pursued by the Union in this case, a party may file an unfair labor practice charge with the Authority's General Counsel, who will investigate and issue a complaint, if warranted. *Id.* § 7118(a). The matter is then adjudicated by the Authority, and the Authority's decision is subject to judicial review. *Id.* §§ 7118, 7123. Under the second track, which was followed here, a party may file a grievance in accordance with its collective bargaining agreement that alleges an unfair labor practice, a violation of the collective bargaining agreement, or both. The

grievance is subject to binding arbitration, *id.* § 7121(b)(1)(C)(iii), and the arbitral award is subject to review by the Authority, *id.* § 7122(a). The Authority's order is not subject to judicial review "unless the order involves an unfair labor practice under section 711[6]" of the Statute. *Id.* § 7123(a)(1). The second track is the track for those who "prefer[] to benefit from the relatively expeditious and (presumably) final result that arbitration promise[s]." *OEA*, 824 F.2d at 66. By offering its one level of review at the administrative level, it protects Congress's interest in providing "arbitration results substantial finality." *Id.* at 63. Its limited exception that allows a second level of review—judicial review—furthers Congress's other stated interest of ensuring "a single, uniform body of case law concerning unfair labor practices." *AFGE, Local 2510*, 453 F.3d at 505.

Reading the exception broadly, then, would be contrary to "the proarbitration policy Congress articulated in passing the Act." *OEA*, 824 F.2d at 66. For that reason, we have found that judicial review is only available where the "substance of the unfair labor practice" is "'discussed in some way in, or [is] some part of, the Authority's order.'" *AFGE, Local 2510*, 453 F.3d at 505 (quoting *OEA*, 824 F.2d at 65). "A mere 'passing reference' to an unfair labor practice will not suffice," *id.* at 503, nor will the fact that "the underlying conduct could be characterized as a statutory unfair labor practice," *OEA*, 824 F.2d at 66. Instead, "the conduct must actually be so characterized and the claim pursued,

by whatever route, as a statutory unfair labor practice, not as something else." *Id.* at 66.

The order need not address an unfair labor practice "on the merits" to "involve" an unfair labor practice, but it does need to include some "sort of substantive evaluation of a statutory unfair labor practice." *OEA*, 824 F.2d at 71. For example, in *OEA*, the Authority did not decide an unfair labor practice claim on the merits because it concluded that the claim was precluded by a previously-filed claim. *Id.* Its order nonetheless "involved" an unfair labor practice because it included a detailed substantive analysis and comparison of the two unfair labor practice claims such that its discussion of unfair labor practices was "no mere citation in passing." *Id.* at 70–71.

On the other hand, we have found that an order did not "involve" an unfair labor practice where the "arbitrator's decision clearly frame[d] the issue as one arising solely under the parties' collective bargaining agreements" and the Authority's order "repeat[ed] the arbitrator's statement of the issue as one sounding in contract." *U.S. Dep't of Interior v. FLRA*, 26 F.3d 179, 184 (D.C. Cir. 1994) ("*DOI*"). We have also found that the standard was not met where the Authority's order reviewing an arbitration fee award contained "neither a single mention of § 7116 (unfair labor practices) nor any discussion of the arbitrator's finding of an unfair labor practice other than passing references" to the issues in the underlying dispute. *AFGE, Local 2510*, 453 F.3d at 504. Where an order does not

contain a substantive discussion of an unfair labor practice claim, there is no need to depart from Congress's "established policy 'favoring arbitration of labor disputes and accordingly granting arbitration results substantial finality,' which . . . underlies the general rule in § 7123 barring judicial review of arbitral awards" because "there is no risk the Authority will leave the path of the law of unfair labor practices and yet escape the review that would bring it back to the straight and narrow." *Id.* at 505 (quoting *OEA*, 824 F.2d at 63).

The Authority's order in this case does not "involve" an unfair labor practice under our precedent. The Authority did not engage in any substantive discussion of the Union's unfair labor practice claim in its order, but instead explicitly found that the arbitrator was justified in concluding that the substance of the unfair labor practice claim was not part of the dispute. As in *DOI*, the "arbitrator's decision clearly frames the issue as one arising solely under the parties' collective bargaining agreements," the "arbitrator analyzes the case as an alleged breach of contract," and the Authority's order "repeats the arbitrator's statement of the issue as one sounding in contract." *DOI*, 26 F.3d at 184. Therefore, as in *DOI*, the order does not "involve" an unfair labor practice.

We note that if the Union wished to protect its right to judicial review of any possible unfair labor practice claims, it could have utilized the first track provided by the Statute which leads to judicial review. Because it instead decided to proceed

through the second track, it is bound by the Statute's ban on judicial review unless the Authority's order "involves" an unfair labor practice.

The Union fails in its attempt to characterize this order as involving an unfair labor practice by pointing to its effect on the Union's unfair labor practice allegations. While the Authority ensured that the Union's unfair labor practice claim will not be considered on its merits by affirming the arbitrator's framing of the issues, our caselaw is clear that the Authority's order itself must have some "bearing upon the law of unfair labor practices" in order to qualify as an order that "involve[s] an unfair labor practice." *AFGE, Local 2510*, 453 F.3d at 505. A passing reference to an unfair labor practice or a mere effect on the reviewability of an unfair labor practice claim is not enough. Because the Authority's order in this case deals solely with arbitration procedure, and neither discusses nor in any other way affects substantive law regarding unfair labor practices, it does not "involve" an unfair labor practice. We have no jurisdiction to review the order.

III. Conclusion

For the reasons discussed above, we dismiss the petition for lack of jurisdiction.

TATEL, *Circuit Judge*, dissenting: The court concludes that we lack jurisdiction to hear the union's challenge to a Federal Labor Relations

Authority order that disposed of the union's unfair labor practice claim based solely on an arbitrator's unexplained failure to resolve that claim during the grievance process. Because I believe that the Authority's order "involves an unfair labor practice" within the meaning of section 7123(a)(1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.*, and that the court's interpretation to the contrary finds no support in our precedent, I respectfully dissent.

I.

As the court correctly observes, the statute establishes a two-track system in which an aggrieved union can either file an unfair labor practice charge with the Authority's General Counsel or submit a grievance to binding arbitration, but may not do both. *See Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 62-63 (D.C. Cir. 1987) ("*OEA*"). In this case, the union chose to pursue its unfair labor practice claim through the grievance process. In its pre-hearing brief before the arbitrator, the union argued that the employer committed unfair labor practices in two ways: by changing employee working conditions without affording the union notice and an opportunity to bargain; and by committing a clear and patent breach of the collective bargaining agreement. Although the court mentions only the latter allegation, *see* Maj. Op. at 2-3, the arbitrator explicitly acknowledged both claims in her opinion. Despite reciting the union's unfair labor practice charges nearly verbatim, the arbitrator nonetheless

framed the issue before her as arising solely under the parties' collective bargaining agreement. Finding no breach of that agreement, she denied the union's grievance. In so doing, the arbitrator offered no explanation for failing to address the union's unfair labor practice claim.

When the union appealed to the Authority, arguing that the arbitrator improperly ignored its unfair labor practice claim, the employer countered that the arbitrator had in fact addressed the alleged unfair labor practices, but had simply found against the union. *Ass'n of Civilian Technicians, N.Y. State Council*, 60 F.L.R.A. 890, 891 (2005). Correcting this inaccurate assertion, the Authority "agree[d] with the union that the Arbitrator did not address whether [the employer]'s actions constituted unfair labor practices under the Statute." *Id.* Nonetheless, the Authority upheld the arbitrator's award, reasoning that "[i]n the absence of a stipulation that . . . included the issue of whether the [employer] committed any unfair labor practices, the Arbitrator was not obligated to address and resolve whether the [employer]'s actions violated the Statute." *Id.*

Still seeking some resolution to its unfair labor practice claim, the union moved for reconsideration, arguing that the statute provides for (1) a unilateral right to have an unfair labor practice claim resolved through the grievance process and (2) appeals to both the Authority and the U.S. Court of Appeals. The Authority denied the motion, again citing its general policy of deferring to an

arbitrator's framing of the issues absent an employer stipulation. *Ass'n of Civilian Technicians, N.Y. State Council*, 61 F.L.R.A. 664, 666-67 (2006) ("*ACT*"). The union petitioned for review, arguing that the Authority had denied what the statute expressly requires: resolution of its unfair labor practice claim. The court now dismisses the union's petition for lack of jurisdiction under section 7123(a)(1), reasoning that the Authority's order merely "involves rules applicable to arbitration" that happened to result "in the unfair labor practice claim's exclusion from review." Maj. Op. at 4. In my view, this result ignores the facts of this dispute and conflicts with both the statute and our precedent.

II.

Section 7123(a)(1) allows this court to hear appeals from Authority decisions reviewing arbitral awards if the award "involves an unfair labor practice," a standard we have addressed in some depth on three separate occasions. In *OEA*, we considered two separate Authority orders, finding ourselves with jurisdiction over one order because it "necessarily implicated" an unfair labor practice claim, but without jurisdiction over the other because the union had pursued its claim on a contract theory. 824 F.2d at 69, 71. In *U.S. Dep't of the Interior v. FLRA*, 26 F.3d 179 (D.C. Cir. 1994) ("*DOI*"), we found ourselves without jurisdiction because the union had made only two "passing references" to unfair labor practices and had pursued its claim as a contract action. *Id.* at 183-

84. And in *AFGE, Local 2510 v. FLRA*, 453 F.3d 500 (D.C. Cir. 2006), we found ourselves without jurisdiction over an Authority order that not only failed to "engage at all with the substance of the unfair labor practice," but dealt solely with attorneys' fees. *Id.* at 505. Taken together, these three cases demonstrate that we have jurisdiction to review an Authority order if (1) the aggrieved union consistently pursued its claim as an unfair labor practice throughout the grievance process, (2) the Authority's order necessarily implicates the unfair labor practice claim, and (3) the order discusses the substance of the unfair labor practice claim in some way. This case satisfies all three requirements.

First, as the court correctly notes, for us to have jurisdiction, a union must characterize and pursue its claim "as a statutory unfair labor practice, not as something else." Maj. Op. at 5 (quoting *OEA*, 824 F.2d at 66). In language directly applicable to this case yet absent from the court's opinion, we stated in *OEA* that "[i]t is clear that if a dual-natured type of complaint were *pursued* as a statutory unfair labor practice, *any* FLRA order would be subject to judicial review under section 7123(a)(1), even if the aggrieved party chose to utilize the grievance/arbitration route." 824 F.2d at 64 (emphases altered). Reaffirming this principle in *DOI*, we stated, even more categorically, "[i]f the aggrieved party chose to go the grievance procedure route, but characterized its claim as a statutory unfair labor practice, judicial review *certainly would be available*." 26 F.3d at 183 (emphasis

added). The central thrust of both *OEA* and *DOI*, in other words, is that a union may not pursue its grievance on a breach of contract theory only to transform it belatedly into an unfair labor practice claim in an effort to obtain judicial review.

Here, the union did no such thing. It consistently characterized its claim as an unfair labor practice and pursued it as such throughout the grievance process. As noted above, the union began its pre-hearing brief with its unfair labor practice allegations. In her statement of the parties' positions, the arbitrator spent two paragraphs repeating those allegations. The employer certainly believed the union had raised the claim, even arguing that the arbitrator had actually decided it. The union reasserted its unfair labor practice claim in its exceptions to the arbitral award and pursued it again in its motion for reconsideration. In short, the union consistently characterized the employer's conduct "as a statutory unfair labor practice, not as something else." Maj. Op. at 5 (quoting *OEA*, 824 F.2d at 66).

Attempting to minimize this fact, the court analogizes this case to *DOI* where, as here, the "arbitrator's decision clearly frame[d] the issue as one arising solely under the parties' collective bargaining agreements," the "arbitrator analyze[d] the case as an alleged breach of contract," and the Authority's order "repeat[ed] the arbitrator's statement of the issue as one sounding in contract." Maj. Op. at 7 (quoting *DOI*, 26 F.3d at 184). This is all true, but irrelevant. The unions in *DOI*, unlike

the union here, failed to pursue their claims as statutory unfair labor practices. Instead, the unions insisted their case was "governed by simple contract law," and included only two "essentially gratuitous" references to unfair labor practices in their post-hearing briefs. *DOI*, 26 F.3d at 183-84. That both the arbitrator and Authority characterized the case as a contractual dispute is therefore hardly surprising.

Second, our case law makes clear that for us to have jurisdiction the Authority's order must "necessarily implicate[]" an unfair labor practice claim. *OEA*, 824 F.2d at 68. This language is also conspicuously absent from the court's opinion, even though it is the test we adopted in *OEA* (borrowing the standard from then-Judge Kennedy's opinion in *U.S. Marshals Service v. FLRA*, 708 F.2d 1417, 1420 (9th Cir. 1983)), and have repeated in every subsequent case presenting this jurisdictional question. *OEA*, 824 F.2d at 67-68 ("[T]he standard is that a statutory unfair labor practice must be either an explicit ground for, or be necessarily implicated by, the Authority's decision.") (footnote omitted); *see also AFGE, Local 2510*, 453 F.3d at 504; *U.S. Dep't of Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 687 n.5 (D.C. Cir. 1994); *DOI*, 26 F.3d at 183.

Here, the Authority's order "necessarily implicated" the union's unfair labor practice claim by effectively terminating it. Put another way, before the Authority issued its order, the union had a viable unfair labor practice claim, albeit one that

the arbitrator had inexplicably ignored. After the Authority ruled, however, the union's claim was irretrievably lost. Because section 7116(d) forbids the union from re-filing its allegations with the General Counsel, the Authority's order represents the last word on the union's claim. *See AFGE, Local 1411 v. FLRA*, 960 F.2d 176, 178 (D.C. Cir. 1992) (noting that the purpose of section 7116(d) is "to preclude duplicative proceedings by requiring an aggrieved party to make an election of remedies" when "the same facts and the same decision are involved"). That the Authority grounded its decision in arbitration procedure does nothing to change the order's ultimate effect on the union's unfair labor practice claim. In short, by disposing of the union's claim for all time, the Authority's order must "necessarily implicate[]" it. *OEA*, 824 F.2d at 67-68.

To reach the opposite conclusion, the court relies heavily on *AFGE, Local 2510*, but that case provides a telling contrast to the issue presented here. In *AFGE, Local 2510*, the arbitrator had decided the union's unfair labor practice claim in the union's favor, and the employer declined to challenge that ruling before the Authority, instead appealing only the arbitrator's award of attorneys' fees to the union. 453 F.3d at 502-03. As a result, the Authority's order "addressed only the fee award." *Id.* at 504. We dismissed the union's petition for lack of jurisdiction, emphasizing that the Authority's order—not the arbitral award—must involve an unfair labor practice for us to have jurisdiction. *Id.* at 505. Here, of course, the arbitral

award includes no resolution of the union's statutory claim, but that is the entire point of the union's appeal. Unlike its counterpart in *AFGE, Local 2510*, the union here does not attempt to bootstrap an ancillary issue onto a previously decided unfair labor practice claim in order to obtain judicial review. Rather, the union argues that it deserves resolution of its statutory claim in the first instance. Thus, although we concluded that the Authority's order in *AFGE, Local 2510* did not "necessarily implicate" an unfair labor practice claim, *id.* at 504, the facts support the opposite conclusion here.

Finally, as the court points out, we will review an Authority's order when the "substance of the unfair labor practice" is "'discussed in some way in, or [is] some part of, the Authority's order.'" Maj. Op. at 5 (quoting *AFGE, Local 2510*, 453 F.3d at 505). Here, the Authority argues that it never "assess[ed] the substance of the alleged [unfair labor practice] *at all* in the instant case." Resp't's Br. 20 (emphasis added). In a similar vein, the court states that "the Authority did not engage in *any* substantive discussion of the union's unfair labor practice claim in its order." Maj. Op. at 7 (emphasis added). The record shows otherwise. In denying the union's motion for reconsideration—in an order challenged here—the Authority included the following substantive discussion of the union's claims:

> Even if we were to address the alleged unfair labor practices, we would nonetheless find

> that the denial of the grievance was not deficient. Specifically, the Arbitrator found that the [employer] did not breach the agreement. Authority precedent establishes that unless there is a breach of an agreement, there can be no repudiation in violation of the Statute, as was alleged by the union at arbitration. *See, e.g., Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 F.L.R.A. 858, 862 (1996) (the first element that must be established to support an allegation of repudiation in violation of the Statute is that the respondent's actions constituted a breach of the agreement that was clear and patent). In addition, the record establishes that the Arbitrator enforced lawful, agreed-upon limits on the obligation to bargain and that, consequently, the [employer]'s actions did not constitute a failure to bargain. *See AFGE Local 3529*, 52 F.L.R.A. 1313, 1319-20 (1997).

ACT, 61 F.L.R.A. at 666 n.4. The Authority thus addressed both of the union's unfair labor practice allegations. To be sure, the Authority's discussion does not amount to a decision on the merits of the union's claim, but "something less than treatment 'on the merits' is required" for us to have section 7123(a)(1) jurisdiction. *OEA*, 824 F.2d at 71.

Ignoring the Authority's order denying rehearing, the court demands more. Quoting half a sentence from *OEA*, it explains that to confer

jurisdiction, the Authority's order "does need to include some 'sort of substantive evaluation of a statutory unfair labor practice.'" Maj. Op. at 6 (quoting *OEA*, 824 F.2d at 71). But in the portion of the sentence not quoted by the court, we concluded that "th[e] sort of substantive evaluation" at issue in that case "*abundantly suffice[d]* to satisfy the relatively imprecise 'involves' standard of section 7123(a)(1)." *OEA*, 824 F.2d at 71 (emphasis added). Although the discussion here may not "abundantly suffice[] to satisfy" section 7123(a)(1), it suffices nonetheless. Not only does the Authority's order include a "substantive evaluation" of the union's claim, but that evaluation, though dictum, carries precedential weight in future Authority proceedings. *See, e.g.*, *Def. Sec. Assistance Dev. Ctr.*, 60 F.L.R.A. 292, 294 (2004) (citing Authority dicta while analyzing a claim); *U.S. Border Patrol Livermore Sector Dublin, Cal.*, 58 F.L.R.A. 231, 233 (2002) (same); *AFGE, Local 32*, 51 F.L.R.A. 491, 502 (1995) (same).

In sum, the union pursued its statutory claim throughout the grievance process, the Authority's order "necessarily implicated" that claim by terminating it, *OEA*, 824 F.2d at 68, and the Authority discussed the substance of the claim "in some way." *AFGE, Local 2510*, 453 F.3d at 505 (quoting *OEA*, 824 F.2d at 65). We have never demanded more to find jurisdiction.

III.

For the foregoing reasons, I would find section 7123(a)(1) jurisdiction and go on to review the Authority's conclusion that an arbitrator has no obligation to resolve a union's unfair labor practice claim unless an employer stipulates to that claim. The union argues that under a plain reading of the statute, "a union that raises an [unfair labor practice] claim as a grievance has a unilateral right to demand that the claim be resolved by binding arbitration." Pet'r's Opening Br. 24.

The union's textual argument proceeds as follows. Section 7116(d) expressly allows unions to raise unfair labor practice claims in grievance procedures, and section 7121(a)(1), in turn, requires those procedures to be processes for "*resolving* grievances" (emphasis added). Then, citing section 7121(b)(1)(C)(iii), the union argues that because either party to a dispute may demand that "any grievance not satisfactorily settled . . . be subject to binding arbitration," the statute grants unions the right to have unfair labor practice claims "resolved" through arbitration. According to the union, allowing a statutory claim to vanish if an employer refuses to stipulate to it conflicts with the statute because the grievance procedure would then fail to "resolve" the grievance.

The union reads the statute correctly. "Resolve" means "to reach a decision about" or "settle." Webster's Third New International Dictionary 1933 (1993). Under the Authority's "no obligation" rule,

however, the grievance process may end without deciding a union's unfair labor practice claim or settling it in any meaningful sense. The claim can simply evaporate.

The Authority offers no response to the union's textual argument. Instead, it argues that not all unfair labor practice claims are ultimately "resolved" under the statute. As the Authority points out, if the General Counsel declines to issue a complaint upon a union's request, the issue never reaches the Authority for review. The statute, however, requires the General Counsel to give the union a written statement of reasons for declining to issue a complaint. *See* 5 U.S.C. § 7118(a)(1) ("In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint."). Under the Authority's rule, unions choosing to pursue their unfair labor practice claims through arbitration—their right under the statute—can be denied even this.

At bottom, the Authority argues that the arbitrator resolved the union's claim by ignoring it. Because I believe the statute requires more, I would grant the union's petition for review and remand the case to the Authority with instructions to return it to the arbitrator for a decision on the merits of the union's unfair labor practice claim.

IV.

Contrary to the court's view—and to return to the jurisdictional issue—my disposition would further Congress's strong pro-arbitration policy by guaranteeing unions some resolution of their unfair labor practice claims through grievance procedures. The court's decision, by contrast, will discourage unions from choosing the very grievance and arbitration process that Congress seeks to promote. Eager to preclude judicial review, employers will have no incentive to stipulate to a union's unfair labor practice claim in arbitration and every reason not to do so. Unions, in turn, will justifiably fear that arbitrators will ignore their properly raised statutory claims without explanation, rendering those claims lost for all time. The result is easy to predict: instead of seeking arbitration, unions will file unfair labor practice charges with the General Counsel. Indeed, unions would be wise to follow this course, for if the General Counsel declines to pursue their unfair labor practice claims, they will at least receive a written explanation. As this case makes abundantly clear, however, unions choose the grievance track at their peril.

Finally, my proposed disposition, unlike the court's decision, would ensure "a single, uniform body of case law concerning unfair labor practices." *AFGE, Local 2510*, 453 F.3d at 505. If, on remand, the arbitrator ruled against the union, the union could appeal to the Authority. Judging from the merits discussion in the Authority's denial of the union's motion for reconsideration, I think it safe to

assume that the Authority would find against the union. If the union sought review here, we could then perform our statutory function by ensuring that the Authority had not left "the path of the law of unfair labor practices" while "escap[ing] the review that would bring it back to the straight and narrow." *Id.* By short-circuiting this process, the court denies us that opportunity.

APPENDIX B

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ASSOCIATION OF CIVILIAN TECHNICIANS NEW YORK STATE COUNCIL
(Union)

and

UNITED STATES DEPARTMENT OF DEFENSE NATIONAL GUARD BUREAU STATE OF NEW YORK DIVISION OF MILITARY AND NAVAL AFFAIRS
(Agency)

Case No. 0-AR-3877
(60 FLRA 890 (2005))

ORDER DENYING MOTION FOR RECONSIDERATION

August 23, 2006

Before the Authority: Dale Cabaniss, Chairman and Carol Waller Pope, Member.

I. Statement of the Case

This matter is before the Authority on the Union's motion for reconsideration of the Authority's decision in *Ass'n of Civilian*

Technicians, New York State Council, 60 FLRA 890 (2005) (*New York State Council*). The Agency did not file an opposition to the Union's motion.

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority decision. We conclude that the Union has failed to establish extraordinary circumstances warranting reconsideration of the decision in *New York State Council*. Accordingly, we deny the Union's motion.

II. Decision in New York State Council

In 2003, the New York State Clean Indoor Air Act was amended to prohibit smoking indoors in the workplace. As a result, the Adjutant General of the New York Army and Air National Guard issued a new smoking policy that prohibited smoking in all facilities occupied by the New York Army and Air National Guard. The Union filed a grievance.

The parties were unable to stipulate the issues for resolution by the Arbitrator. While noting the Union's allegation that the Agency's "action was an unfair labor practice[,]" the Arbitrator determined that "[a]t the heart of this case is a dispute over the interpretation and application of the language of the Parties' Collective Bargaining Agreement." Award at 12, 20. Accordingly, in framing the issue to be resolved in the absence of a stipulation of the issue by the parties, the Arbitrator framed the issue as only a contractual one: whether the Agency violated the parties' collective bargaining agreement when it issued a new smoking policy

and, if so, what should the remedy be. *See id.* at 2. The Arbitrator denied the grievance. She found that the Agency did not violate the parties' collective bargaining agreement when it issued the new smoking policy.

The Union filed two exceptions to the award, and the Authority denied both exceptions.

First, the Union contended that the award was deficient because "the arbitrator improperly failed to address whether the agency's action was an unfair labor practice." *60 FLRA at 891* (quoting Exceptions at 8). The Authority viewed this contention as a claim that the Arbitrator exceeded her authority by failing to resolve an issue submitted to arbitration. The Authority ruled that the Arbitrator did not fail to resolve an issue submitted. In this regard, the Authority concluded that as the parties did not stipulate that this case involved an unfair labor practice claim, the Arbitrator was not obligated to address and resolve whether the Agency's actions violated the Federal Service Labor-Management Relations Statute (Statute). *See id.* Because the Arbitrator was not obligated to address and resolve whether the Agency's actions violated the Statute, the Authority found that the Union's claim that the Agency's conduct constituted an unfair labor practice provided no basis for finding the award deficient. Accordingly, the Authority denied this exception.

Second, the Union contended that the award was contrary to law because the circumstances under which federal employees are allowed to smoke in the workplace are negotiable conditions of

employment. The Authority noted that it "has repeatedly acknowledged that parties are permitted to define through negotiations their bargaining obligations under the Statute." *Id. at 892* (citations omitted). The Authority stated that the Arbitrator had permissibly interpreted the relevant collective bargaining agreement provision as defining the parties' bargaining obligation over smoking and limiting that obligation to matters that were "within the purview of [t]he Adjutant General's . . . smoking policy letter." *Id.* The Authority further found that "[a]s the Arbitrator was simply enforcing lawful, agreed-upon limits on the parties' obligation to bargain on the circumstances under which technicians could smoke, the award is not contrary to law." *Id.* Consequently, the Authority denied this exception as well.

III. Union's Motion for Reconsideration

The Union contends that reconsideration of *New York State Council* is warranted for two reasons.

First, the Union asserts that "[t]he failure of the Arbitrator and the Authority to decide the unfair labor practice claims was contrary to law." Motion for Reconsideration at 8. The Union states that under the Statute, grievances may properly raise unfair labor practice allegations and contends that the failure of an arbitrator to resolve such an allegation that has been presented by a party is contrary to the Statute. In this regard, the Union asserts that it had a unilateral right under the Statute to raise its allegations that the Agency had

violated the Statute under the negotiated grievance procedure and to obtain resolution of the allegations by binding arbitration, with a right of review of the award by both the Authority and a United States court of appeals to determine whether the resolution of the unfair labor practice allegations was consistent with the Statute. Accordingly, the Union claims that the Authority erred when it ruled that in the absence of a stipulation that included the unfair labor practice allegations, the Arbitrator was not obligated to address and resolve whether the Agency's actions violated the Statute.

Second, the Union contends that reconsideration is warranted because, contrary to the finding of the Authority, the Arbitrator did not interpret and apply the parties' collective bargaining agreement in denying the grievance. The Union asserts that instead, the Arbitrator erroneously held that state law authorized and required the Agency to breach the agreement.

IV. Analysis and Conclusions

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority decision. The Authority has identified a limited number of situations in which it has found extraordinary circumstances to exist. *See United States Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Ill., 50 FLRA 84, 86-87 (1995).* These include situations in which the Authority erred in its conclusions of law or factual findings. The party seeking reconsideration of the

decision of the Authority has a heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *See id. at 85.* We conclude that the Union has failed to meet the heavy burden of establishing that extraordinary circumstances exist to justify reconsideration of *New York State Council.*

With respect to the Union's first claim, the Authority, like federal courts in reviewing arbitration awards in the private sector, accords an arbitrator's formulation of the issues submitted in the absence of a stipulation the same substantial deference accorded an arbitrator's interpretation and application of the collective bargaining agreement. *See, e.g., Air Force Space Div., Los Angeles Air Force Station, Cal., 24 FLRA 516, 518-19 (1986)* (citing *Mobil Oil Corp. v. Indep. Oil Workers Union, 679 F.2d 299 (3d Cir. 1982)).* Thus, the Authority's uniform practice has been to grant substantial discretion to arbitrators to decline to consider issues in cases in which there is no stipulation. *See United States Dep't of Veterans Affairs Medical Center, Providence, R.I., 49 FLRA 110, 116 (1994).* This practice is consistent with the language of the Statute, which reflects Congressional intent to apply private sector labor arbitration practice to the practice under the Statute. *See* § 7122(a)(2).

In *New York State Council,* the Authority noted that the Arbitrator framed the merits issue for resolution as whether the Agency violated the collective bargaining agreement when it issued a new smoking policy and that the award resolved this issue. *See 60 FLRA at 891.* In these

circumstances, the Authority concluded that the Arbitrator properly confined herself to determining whether the Agency violated the agreement and was not obligated to address and resolve whether the Agency's actions violated the Statute. In support of this conclusion, the Authority cited its decision in *AFGE Local 1367, 60 FLRA 187 (2004)* (Chairman Cabaniss dissenting) for the proposition that an arbitrator is not obligated to address whether an agency's actions violated law where, in the absence of a stipulation of issues by the parties, the arbitrator framed the issue only in terms of a violation of the collective bargaining agreement.

In its motion for reconsideration, the Union does not directly challenge the Authority's practice of deferring to an arbitrator's formulation of the issues to be decided, in the absence of the parties' stipulation of the issues. Instead, the Union argues that the failure of the Arbitrator and the Authority to decide the unfair labor practice claims in this case was contrary to § 7116(d) of the Statute.[1] In the Union's view, § 7116(d) provides the Union not only with a unilateral right to raise unfair labor practice allegations under a negotiated grievance

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[1] Section 7116(d) pertinently provides: "Except for matters wherein . . . an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures."

procedure, but also entitles it to a resolution of those allegations by the arbitrator along with a right of review of the award by both the Authority and a United States court of appeals to determine whether the resolution of the allegations was consistent with the Statute.

For the reasons that follow, we reject this claim and conclude that § 7116(d) does not provide a basis for reconsidering the application of the Authority's practice of deferring to an arbitrator's formulation of the issues for resolution in the absence of a stipulation, even where a party alleges an unfair labor practice before the arbitrator.

As the Authority has repeatedly acknowledged, § 7116(d) is an election-of-remedy provision and its purpose and effect is to prevent relitigation of an issue in another forum after a selection of forum in which to raise the issue has been made by the aggrieved party. *See, e.g., AFGE, Council 170, Local 2128, 58 FLRA 316, 317 (2003)* (citing *Fed. Bureau of Prisons, 18 FLRA 314, 316 (1985)).* By its language, § 7116(d) confirms that issues that can properly be raised as an unfair labor practice or as a grievance may in the discretion of the aggrieved party be raised under the negotiated grievance procedure or the statutory unfair labor practice procedure, but not under both procedures. It is similar to other choice-of-forum provisions in the Statute, such as § 7121(d).[2] The essential feature of

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[2] Section 7121(d) provides that complaints of employment discrimination that are not excluded from the applicable negotiated grievance procedure may be raised as a grievance or as a statutory

these choice-of-forum provisions in the Statute is the confirmation that certain claims can be pursued under a negotiated grievance procedure or another statutory procedure and that aggrieved parties must choose only one procedure under which to pursue their claim.

The Union has pointed to no wording in the Statute or other authority establishing that in addition to mandating an election of forums for the purpose of preventing relitigation, § 7116(d) also mandates a merits resolution of the unfair labor practice allegation by the arbitrator if a grievance is filed, as well as Authority and judicial review of the resolution of the allegation. We note, in this regard, that if an aggrieved party elects under § 7116(d) to file an unfair labor practice charge with the Authority and the Authority's General Counsel determines that an unfair labor practice issue is not presented and decides not to issue a complaint, then § 7116(d) does not entitle the party to a resolution by the Authority of whether an unfair labor practice was committed. Thus, adopting the Union's approach would provide those who chose to use the grievance procedure, rather than the procedures of § 7118 of the Statute, to litigate alleged unfair labor practices with an inequitable advantage. This same inequity would extend to judicial review by a United States court of appeals under § 7123 of the Statute,[3] which is not available

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equal employment opportunity complaint, but not both.

[3] Section 7123(a) provides that the Authority's decision resolving exceptions to an arbitration

with respect to a determination of the General Counsel that no unfair labor practice was presented. *See Turgeon v. FLRA, 677 F.2d 937 (D.C. Cir. 1982)* (a determination not to issue an unfair labor practice complaint is not reviewable by the Authority and generally is not reviewable by a court).

Without any textual or other support for the Union's argument that § 7116(d) requires arbitrators to always address and resolve alleged unfair labor practice allegations that a party may raise, we decline to impose such a requirement. Instead, in our view, aggrieved parties elect the forum as it is constituted under the provisions of the Statute.

Furthermore, no other basis has been established for fashioning a special rule under the Statute solely for unfair labor practice allegations submitted to arbitration. That is, we see no basis for treating such allegations different from other contrary-to-law allegations, or any grievable issue for that matter. Under the definition of grievance set forth in § 7103(a)(9) of the Statute, claims based on alleged violations of law, as well as claims based on other grounds, are all grievable under the Statute. The Union provides no basis on which to support its contention that statutory unfair labor practice grievances warrant special consideration under the Statute.

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award under § 7122 of the Statute is not judicially reviewable "unless the order involves an unfair labor practice under § 7118[.]"

Accordingly, we deny the Union's motion for reconsideration of our denial of its exceeded authority exception in *New York State Council.*[4]

We also reject the Union's second assertion that reconsideration is warranted because, contrary to the finding of the Authority, the Arbitrator did not interpret and apply the parties' agreement in denying the grievance. In *New York State Council,* the Authority expressly noted that the Arbitrator specifically framed the merits issues as whether the Agency violated the agreement when it issued a new smoking policy and that in denying the

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[4] Even if we were to address the alleged unfair labor practices, we would nonetheless find that the denial of the grievance was not deficient. Specifically, the Arbitrator found that the Agency did not breach the agreement. Authority precedent establishes that unless there is a breach of an agreement, there can be no repudiation in violation of the Statute, as was alleged by the Union at arbitration. *See, e.g., Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill., 51 FLRA 858, 862 (1996)* (the first element that must be established to support an allegation of repudiation in violation of the Statute is that the respondent's actions constituted a breach of the agreement that was clear and patent). In addition, the record establishes that the Arbitrator enforced lawful, agreed-upon limits on the obligation to bargain and that, consequently, the Agency's actions did not constitute a failure to bargain. *See AFGE Local 3529, 52 FLRA 1313, 1319-20 (1997).*

grievance, the Arbitrator specifically interpreted and applied the agreement when she found that the Agency did not violate the agreement when it issued a new smoking policy. *See 60 FLRA at 890-91.* The Union's assertion that the Arbitrator did not apply the agreement fails to establish a factual error by the Authority warranting reconsideration.

V. Order

The Union's motion is denied.

APPENDIX C

FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ASSOCIATION OF CIVILIAN TECHNICIANS NEW YORK STATE COUNCIL
(Union)

and

UNITED STATES DEPARTMENT OF DEFENSE NATIONAL GUARD BUREAU STATE OF NEW YORK DIVISION OF MILITARY AND NAVAL AFFAIRS
(Agency)

0-AR-3877

DECISION

May 4, 2005

Before the Authority: Dale Cabaniss, Chairman, and Carol Waller Pope and Tony Armendariz, Members.

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Elizabeth C. Wesman filed by the Union under § 7122(a) of the

Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator denied the grievance over the Agency's implementation of a new smoking policy. For the reasons set forth below, we deny the Union's exceptions.

II. Background and Arbitrator's Award

On March 26, 2003, the New York State Clean Indoor Air Act was amended to prohibit smoking indoors in the workplace. As a result, the Adjutant General of the New York Army and Air National Guard issued a new smoking policy that prohibited all smoking in all facilities occupied by the New York Army and Air National Guard.

In response to union concerns over the new smoking policy, the New York Division of Military and Naval Affairs (DMNA) advised that the amendments to the New York State Clean Indoor Air Act were binding on it and that it was required to ban smoking in any facility under its control. The Union filed a grievance. The grievance was not resolved and was submitted to arbitration.

The parties were unable to stipulate the issues for resolution. After reviewing the parties' proposed statements of issues and determining that "at the heart of this case is a dispute over the interpretation and application of the language of the Parties' Collective Bargaining Agreement[,]" the Arbitrator found the issues in this case to be as follows:

> Did the Agency violate the Collective Bargaining Agreement when it issued a new smoking policy . . .?
>
> If so, what should the remedy be?

Award at 20, 2.

Before the Arbitrator, the Union claimed that the Agency's unilateral implementation of the new smoking policy and its refusal to rescind the policy violated the parties' agreement and constituted unfair labor practices. The Union asserted that these actions violated Article 6, Section 4, which requires local negotiation of smoking rules, and Article 7, which requires state-level negotiation of matters not resolved at the local level. The Union also asserted that these actions constituted unfair labor practices because the Agency unilaterally changed conditions of employment and because the Agency patently breached the collective bargaining agreement.

The Union also maintained that the Agency could not rely on state law because "state law does not trump federal law." *Id.* at 13. The Union argued that no federal law authorizes state regulation of the conditions of employment of federal employees. Before the Arbitrator, the Agency asserted that the new smoking policy was not subject to negotiation because it implemented a mandate to the Agency under law, which implementation was essentially nondiscretionary in nature.

The Arbitrator denied the grievance. She found that the Agency did not violate the parties' collective bargaining agreement when it issued the new smoking policy. She ruled that, by limiting negotiations to matters "within the purview" of the Agency's smoking policy, Article 6, Section 4 of the agreement "limits the parties' latitude to negotiate employee smoking rules."[1] *Id.* at 23. She ruled that the Adjutant General's new smoking policy removed discretion over the policy from "the purview of the DMNA." *Id.* at 24. The Arbitrator concluded that, as a result, the parties' agreement permitted the Agency to refuse to bargain over the policy. *See id.*

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the award is deficient because "the arbitrator improperly failed to address whether the agency's action was an unfair labor practice." Exceptions at 8. In this respect, the Union claims that the undisputed facts establish that the agency's conduct constituted a unilateral change of conditions of employment without bargaining and a patent breach of the collective

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[1] Article 6, Section 4 provides: "The Chapter President . . . will meet with the local facility supervisors to negotiate over rules governing employees smoking within the purview of The Adjutant General's DMNA smoking policy letter." Award at 3.

bargaining agreement, both in violation of the Statute.

The Union also contends that the award is contrary to law. In contending that the award is contrary to law, the Union asserts that the circumstances under which federal employees are allowed to smoke in the workplace are negotiable conditions of employment. The Union maintains that only federal law can authorize state regulation of federal facilities. The Union argues that without a federal statute, the matter of smoking could not be removed from the purview of the DMNA.

B. Agency's Opposition

The Agency argues that the Arbitrator properly determined that the DMNA was required to implement New York state law prohibiting indoor smoking in the workplace and had no discretion. The Agency disputes that the Arbitrator failed to address whether the Agency committed any unfair labor practices. The Agency asserts that the Arbitrator addressed the Agency's actions, but found that they did not constitute unfair labor practices.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed her authority.

The Union contends that the award is deficient because "the Arbitrator improperly failed to address whether the Agency's action was an unfair labor practice." *Id.* We view this as a contention

that the award is deficient because the Arbitrator exceeded her authority. Arbitrators exceed their authority when, among other things, they fail to resolve an issue submitted to arbitration. *See, e.g., AFGE Local 1367, 60 FLRA 187, 190 (2004)* (Chairman Cabaniss dissenting). In this case, we agree with the Union that the Arbitrator did not address whether the Agency's actions constituted unfair labor practices under the Statute. However, we conclude that the Union fails to establish that in not addressing whether the Agency committed any unfair labor practices, the Arbitrator exceeded her authority.

The parties in this case were unable to stipulate the issues for resolution. After reviewing the parties' proposed statements of issues, the Arbitrator found that "at the heart of this case is a dispute over the interpretation and application of the language of the Parties' Collective Bargaining Agreement." Award at 20. Accordingly, the Arbitrator framed the issues in this case, as follows:

> Did the Agency violate the Collective Bargaining Agreement when it issued a new smoking policy . . .?
>
> If so, what should the remedy be?

Id. at 2. The award is precisely a resolution of these issues.

In these circumstances, the Arbitrator properly confined herself to determining whether the Agency violated the agreement. In the absence of a

stipulation that also included the issue of whether the Agency committed any unfair labor practices, the Arbitrator was not obligated to address and resolve whether the Agency's actions violated the Statute. *See AFGE Local 1367, 60 FLRA at 190* (where, in the absence of a stipulation of issues by the parties, the arbitrator framed the issue in terms of a violation of the collective bargaining agreement, the arbitrator was not obligated to address whether the agency's actions violated law). Moreover, because the Arbitrator was not obligated to address and resolve whether the Agency's actions violated the Statute, the Union's claim that the Agency's conduct constituted unfair labor practices provides no basis for finding the award deficient. *See id.* (Authority determined that union failed to show how award confined to interpreting the parties' agreement was contrary to law).

Accordingly, we deny this exception.

B. The award is not contrary to law.

We review questions of law raised by exceptions to an arbitrator's award *de novo*. *See NTEU Chapter 24, 50 FLRA 330, 332 (1995)*. In applying a standard of *de novo* review, we determine whether the award is consistent with the applicable standard of law. *See NFFE Local 1437, 53 FLRA 1703, 1710 (1998)*.

In denying the grievance, the Arbitrator found that under the terms of Article 6, Section 4, the parties agreed that the Agency was obligated to bargain only over matters "within the purview of the Adjutant General[][.]" Award at 3. The

Arbitrator ruled that the matter of indoor smoking had been removed from the discretion and purview of the Adjutant General. Consequently, she found no duty to bargain under the agreement on the circumstances under which technicians could smoke. We reject the Union's claim that this award is contrary to law.

The Authority has repeatedly acknowledged that parties are permitted to define through negotiations their bargaining obligations under the Statute. *See, e.g., Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio, 51 FLRA 1532, 1536 (1996); accord AFGE Local 3529, 52 FLRA 1313, 1319 (1997).* Unless the contract provision is unenforceable, "once the parties have defined their bargaining obligations through an agreement, the issue of whether the parties have complied with the agreement becomes a matter of contract interpretation for the arbitrator." *AFGE Local 3529, 52 FLRA at 1319.*

The Arbitrator interpreted Article 6, Section 4 as defining the parties' bargaining obligation over smoking and limiting that obligation to matters that were "within the purview of the Adjutant General's DMNA smoking policy letter." The Union fails to establish that, as interpreted by the Arbitrator, the agreement is unenforceable. In particular, the Union does not argue, and no basis is provided for finding, that the parties were prohibited from defining through negotiations their bargaining obligations under the Statute over smoking. Consequently, as interpreted by the Arbitrator, Article 6, Section 4 is enforceable. As

the Arbitrator was simply enforcing lawful, agreed-upon limits on the parties' obligation to bargain on the circumstances under which technicians could smoke, the award is not contrary to law.[2] *Cf. Soc. Sec. Admin., Baltimore, Md., 55 FLRA 1063, 1069 (1999)* (because parties are not prohibited from agreeing to a contract provision regarding a matter covered under § 7106(b)(1) of the Statute, such a provision is enforceable in arbitration, and an award enforcing the contractual provision is not contrary to law); *accord United States Dep't of the Treasury, Internal Revenue Serv., Washington, D.C., 56 FLRA 393, 395-96 (2000).*

Accordingly, we deny this exception.[3]

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[2] This case does not present, and we do not address, the question of whether the Agency would have been obligated to bargain over the impact and implementation of the new smoking policy. The Union never requested to bargain over impact and implementation; the Union's only request was to bargain over the substance of the smoking policy and its unfair labor practice allegations were limited to the Agency's refusal to bargain over the substance of the smoking policy.

[3] In denying this exception, we emphasize that we have reviewed the Arbitrator's award and not the Arbitrator's reasoning in determining that the matter of smoking was not within the purview of the Adjutant General's DMNA smoking policy letter. *See NTEU Chapter 137, 60 FLRA 483, 487 n.11 (2004)* (question before the Authority was whether the award was contrary to law and not

V. Decision

The Union's exceptions are denied.

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whether the arbitrator's reasoning was correct); *United States Dep't of the Navy, Supervisor of Shipbuilding Conversion and Repair, Pascagoula, Miss., 57 FLRA 744, 746 n.5 (2002)* (Authority reviews whether the award is deficient and not whether the arbitrator's reasoning is deficient). Although the Union alleges that the reasons on which the Arbitrator based her determination that the matter of smoking was not within the purview of the Adjutant General's DMNA smoking policy letter are contrary to law, it is well established that the Authority does not review an arbitrator's reasoning in interpreting and applying a collective bargaining agreement. *See, e.g., NATCA, 55 FLRA 1025, 1028 n.7 (1999); United States Dep't of Justice, Immigration and Naturalization Serv., Honolulu Dist. Office, Honolulu, Haw., 41 FLRA 207, 212-13 (1991).*

APPENDIX D

FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF AN ARBITRATION BETWEEN

U.S. DEPARTMENT OF DEFENSE, NATIONAL GUARD BUREAU STATE OF NEW YORK DIVISION OF MILITARY AND NAVAL AFFAIRS

AND

ASSOCIATION OF CIVILIAN TECHNICIANS, NEW YORK STATE COUNCIL

Case No. 041223-02418-8

Subject: Labor Management Agreement Violation

ARBITRATOR

ELIZABETH C. WESMAN, Ph.D.

APPEARANCES

For the Employer: **Paul Sausville, Esq.**
Agency Counsel

For the Union: **Richard M. Woods**
NYS Chairman—ACT

ALSO PRESENT

For the Employer: Colonel Garry J. Colloton—Human Resource Officer

Lynn M. Crouse—Supervisor Human Resources Specialist

John Lankenau—Labor Relations Specialist

For the Union: Daniel E. Shook—Chapter President at ACT, Schenectady Chapter

PROCEEDINGS

U.S. Department of Defense, National Guard Bureau State of New York Division of Military and Naval Affairs ("Employer") and Association of Civilian Technicians, New York State Council ("Union") selected me to act as hearing officer in this matter. The hearing was held on May 12, 2004, at the Division of Military and Naval Affairs HQ building in Latham, New York, at which time both Parties were afforded full opportunity to present testimonial and documentary evidence. The Parties elected to file post-hearing briefs. Following receipt of the briefs the Arbitrator declared the record closed.

ISSUES

At the hearing the parties were unable to stipulate to an issue. After reviewing their respective proposed issues I find the issue in the case to be as follows:

Did the Agency violate the Collective Bargaining Agreement when it issued a new smoking policy letter on 23 July 2003?

If so, what should the remedy be?

PERTINENT CONTRACT PROVISIONS AND LAWS

LABOR/MANAGEMENT AGREEMENT

BETWEEN

THE NEW YORK NATIONAL GUARD

AND

ASSOCIATION OF CIVILIAN TECHNICIANS

2001-2004

* * *

ARTICLE 6

UNION RIGHTS

* * *

Section 3. Representation Rights and Duties

An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general conditions of employment.

Section 4. Smoking Policy

In each chapter area, the Chapter President or their representative will meet with the local facility supervisors to negotiate over rules governing employees smoking within the purview of the Adjutant General's DMNA smoking policy letter.

* * *

ARTICLE 7

UNION-MANAGEMENT COOPERATION

Section 1. Consultation

DMNA agrees that under the provisions of PL 95-454, ACT is entitled to consultation meetings between its representatives and those of DMNA.

a. DMNA agrees, if issues or problems develop that cannot be resolved on local level, to meet with the State Chairman of ACT or a duly appointed representative, at a location mutually agreed upon by both parties, to

discuss such issues or problems. Such meetings will be held as often as necessary.

b. At any installation, the supervisor will refer matters of concern that cannot be resolved by meetings between the supervisor and the steward to his next level supervisor and by the steward to his chapter president.

c. A meeting will be held at any level when requested by DMNA or ACT whenever the subject matter to be resolved is important.

d. Meeting described in paragraphs (a), (b), and (c) above will be held during normal working hours.

Section 2. **Consultation Definition**

For the purposes of this Agreement, consultation is defined as meeting, conferring and negotiating in regard to policies, programs, and practices related to working conditions of members of the unit which are the purview of DMNA, in an effort to reach mutual understanding or agreement.

Section 3. **DMNA Consultation Matters**

Matters appropriate for consultation and negotiation between the parties are personnel policies, programs, and practices related to working conditions, which are within the purview of DMNA. These matters include but are not limited to such matters as safety, training, labor-management relations, employee services, methods of adjusting grievances, appeals, leave, promotion policies, demotion

practices, reduction-in-force matters, and hours of work.

Section 4. Excluded Consultation Matters

No obligation exists to consult or negotiate with the Union with respect to the mission of an agency, its budget, its organization, the number of employees, and the numbers, types and grades of positions of technicians assigned to an organizational unit, work project or tour of duty, the technology of performing its work, or its internal security practices. This does not preclude the parties from negotiation agreements providing appropriate arrangements for technicians adversely affected by the impact of realignment of work forces or technological change.

* * *

ARTICLE 32

DURATIONS AND CHANGES

* * *

Section 2. Agreement Amendments/Supplements

This agreement may be opened at any time by consent of both parties. Also, modifications or amendments of this agreement may be required because of changes in applicable laws. Any request for modifications or amendments shall be in writing and must be accompanied by a summary of the modifications or amendments proposed and the reasons therefore. When the

modification or amendment is required and both parties consent to opening the agreement, representatives of DMNA and ACT will meet to negotiate the matter and no changes other than those required or those covered by the summary shall be considered. Such modifications or amendments shall be subject to the approval of the Department of Defense (DOD) and will be effective on a date determined to be appropriate under the circumstances.

NEW YORK STATE PUBLIC HEALTH LAW

* * *

§1339-n.

For purposes of this article:

* * *

2. "Employer" means any person, partnership, association, limited liability company, corporation or nonprofit entity which employs one or more persons, including the legislative, executive and judicial branches of state government and any political subdivision of the state.

NEW YORK STATE MILITARY LAW

§182. Control of armories and other facilities

1. All armories, arsenals, camps, ranges, bases and other facilities owned, leased or maintained

by the state or by the United States for the use of the organized militia and all activities conducted therein shall be under the general charge and control of and shall be regulated by the adjutant general. He shall be responsible to the governor for the proper expenditure of all moneys appropriated therefore.

2. When two or more units of different forces of the organized militia are stationed in one armory, arsenal, camp, range, base or other facility, the adjutant general shall designate the officer to be in indirect charge and control thereof, shall apportion the quarters and facilities therein to be occupied by each unit and shall regulate the military use and care thereof. The adjutant general shall also designate the officer to be in direct charge and control of any armory, arsenal, camp, range, base or other facility which the adjutant general may retain under his sole jurisdiction.

3. Except as provided in subdivision two hereof, the commander of the force concerned shall designate the officer to be in direct charge and control of each armory, arsenal, camp, base or other facility. All officers so designated pursuant to this subdivision and subdivision two hereof shall observe and enforce all laws, orders and regulations applicable to such armory, arsenal, camp, range, base or other facility, their furnishings, equipment, contents and all activities conducted therein and to the persons employed therein. They shall perform such other duties and functions as may be prescribed by the adjutant general.

4. Subject to the regulations of the adjutant general, officers in charge and control so designated may establish and conduct stores, restaurants, messes and places of recreation in the armory, arsenal, camp, range, base or other facility under their charge and control or they may enter into agreements with responsible parties for establishing and conducting the same.

5. The adjutant general and any officer designated by him, shall have access to all parts of all armories and other facilities at all times.

NEW YORK STATE EXECUTIVE LAW

§190. Division of Military and Naval Affairs

1. Notwithstanding the provisions of any other law, the head of the division of military and naval affairs shall be the adjutant general who shall be appointed by the governor and who, except when any one of such officers shall be in the active service of the United States, shall be the commanding general of the New York army national guard, the commander of the New York air national guard or the commanding officer of the New York naval militia. The governor may exercise and perform his functions, powers and duties as commander-in-chief of the militia of the state in whole or in part through such division . . . .

BACKGROUND

On August 19, 1997, then-President Clinton issued Executive Order 13058 (EO 13058) regarding the Federal Government's concerns about smoking in Federal workplaces. That Executive Order read in pertinent part as follows:

> **PROTECTING FEDERAL EMPLOYEES AND THE PUBLIC FROM EXPOSURE TO TOBACCO SMOKE IN THE FEDERAL WORKPLACE**
>
> * * *
>
> Section 1. Policy. It is the policy of the executive branch to establish a smoke-free environment for Federal employees and members of the public visiting or using Federal facilities. The smoking of tobacco products is thus prohibited in all interior space owned, rented, or leased by the executive branch of the Federal Government, and in any outdoor areas under executive branch control in front of air intake ducts.
>
> Section 2. Exceptions. The general policy established under this order is subject to the following exceptions:
>
> (a) The order does not apply in designated smoking areas that are enclosed and exhausted directly to the outside and away from air intake ducts, and are maintained under negative pressure (with respect to surrounding spaces)

sufficient to contain tobacco smoke within the designated area. Agency officials shall not require workers to enter such areas during business hours while smoking is ongoing.

(b) The order does not extend to any residential accommodation for persons voluntarily or involuntarily residing, on a temporary or long-term basis, in a building owned, leased, or rented by the Federal government.

(c) The order does not extend to those portions of federally owned buildings leased, rented or otherwise provided in their entirety to nonfederal parties.

(d) The order does not extend to places of employment in the private sector or in other nonfederal governmental units that serve as the permanent or intermittent duty station of one or more Federal employees.

* * *

Section 7. Consistency with Other Laws. The provisions of this order shall be implemented consistent with applicable law, including the Federal Service Labor-Management Relations Act (5 U.S.C. § 7101 *et. seq.*) and the National Labor Relations Act (29 U.S.C. § 151 *et seq.*). Provisions of existing collective bargaining agreements shall be honored and agencies shall consult with employee labor representatives about the implementation of this order. Nothing herein shall be construed to impair or alter the powers and duties of Federal agencies established under law. Nothing herein shall be

construed to replace any agency policy currently in effect, if such policy is legally established, in writing, and consistent with the terms of this order. Agencies shall review their current policy to confirm that that agency policy comports with this order, and policy found not in compliance shall be revised to comply with the terms of this order.

Approximately 3½ years later the United States Department of Defense issued Instruction No. 1010.15, entitled "Smoke Free DoD Facilities." That instruction read in pertinent part as follows:

* * *

6. PROCEDURES

DoD Components shall:

6.1. Control worker exposure to ETS by eliminating smoking in DOD facilities.

6.2. Designate "outdoor smoking areas," when possible, which are reasonably accessible to employees and provide a measure of protection from the elements. Since ETS is classified as a "potential Class A carcinogen," exposure to ETS shall be reduced to the lowest possible concentration. Smoke-break areas only should be outdoors and away from common points of ingress and/or egress into and/or out of the DoD facility and not in front of building air intake ducts.

6.3. Prohibit indoor designated smoking areas unless exempted under Sections 2(a) through 2(d), or 2(e) of E.O. 13058 (reference (b)).

6.4. Provide effective smoking cessation at all levels of commands and continue to expand the programs, as needed, as part of implementing restrictions. Due to the highly addictive nature of tobacco, program emphasis shall be on primary prevention practices that motivate DoD personnel not to start smoking. Anti-smoking education messages shall be provided to all personnel. All smokers and high-risk personnel, such as those with chronic respiratory and cardiac conditions and those who are part of special occupational groups, such as asbestos workers, shall receive medical counseling about the risks of smoking. Lectures, films, pamphlets, and other forms of health promotion shall incorporate the latest available medical research information on smoking, health, and treatment.

6.5. Provide information on health risks posed by involuntary inhalation of ETS in health promotion education programs. Before implementation of smoke-free DoD facilities, in accordance with this Instruction, implement the requirements in Chapter 71 of 5 U.S.C. (reference (g)).

On June 4, 2003, the Executive Deputy Director of the New York State Governor's Office of Employee Relations issued Memorandum OER 03-02 regarding a smoking prohibition for all facilities run by employers in the State. The memorandum read in pertinent part as follows:

The New York State Clean Indoor Air Act, which originally became law on January 1,

1990, was amended by the Legislature and signed into law by Governor Pataki on March 26, 2003 to take effect on July 24, 2003. The law now requires every employer in the State to provide smoke-free work areas for all employees in the workplace

Accordingly, effective July 24, 2003, smoking is prohibited in any indoor work area.

Indoor work area shall mean a room, hallway, stairway, bathroom, office, State car, garage, or any other area with a roof or other ceiling enclosure in which State employees may be required to work, occupy, or frequent. All cafeterias and lunchrooms must be designated non-smoking areas. With one exception, noted below, smoking rooms are no longer authorized.

"No Smoking" signs or the international symbol for no smoking shall be prominently and conspicuously posted in all work areas. Signage at all entrances to State-occupied buildings, floors, or offices that the entire area is a smoke-free area is recommended.

To help ensure constructive implementation of the law, labor/management "meet and confer" discussion is encouraged in order to develop ways to promote education and awareness of the hazards of smoking and to ensure that the legal mandates and philosophy behind the policy are known to all.

No appointing authority or designee shall have the discretion to authorize or negotiate any

variance to the law. Union demands regarding the impact on terms and conditions of employment are to be directed to GOER . . . .

Following receipt of that memorandum, on June 30, 2003, New York Army National Guard (NYANG) Chief Warrant Officer 4, Richard Hughes forwarded a copy of the newly revised smoking policy sent to him by Major General Thomas P. McGuire, Adjutant General, NYANG, to ACT State Chairman Richard Woods. That policy read as follows:

SUBJECT: Smoking Policy for Division of Military and Naval Affairs (DMNA) Facilities (Policy #13)

1. Reference, memorandum, MNAG-TAG, 26 July 1990, subject: DMNA Smoking Policy.

2. The above referenced memorandum is rescinded in its entirety.

3. The amendment to the New York State Public Health Law, effective 24 July 2003, prohibits all smoking in National Guard Facilities occupied by the New York Army and Air National Guard and civilian employees. Designated smoking areas must be located outdoors and not in the immediate proximity of entrances. This policy will provide consistency throughout the state.

4. It is my desire to protect the health of our employees by ensuring that they are not exposed to secondhand tobacco smoke within New York National Guard facilities.

> 5. Managers and supervisors are expected to ensure the above policy is adhered to. The intent of this policy is to make this agency a better place in which to work by upgrading the health and safety of the working environment.

By letter of July 21, 2003, Mr. Woods sent a letter to TSgt. John Lakenau, Labor and Employment Relations Specialist, Division of Military and Naval Affairs, in which he expressed the union's concerns regarding the revised smoking policy. His letter reads in essential parts as follows:

> I received your letter dated 30 June 2003 requesting impact and implementation bargaining on the proposed smoking policy change for all NY State Federal employees. As you are aware we already have Contractual language that deals with smoking in the workplace for all Federal employees who work in NY State.
>
> We hereby request the following information to determine whether it is appropriate to negotiate a new agreement based on the change in the NY State law.
>
> 1. A copy of the Law that has precipitated the change in the Contract language.
>
> 2. Please identify the facilities in NY State that are Federal and those that are State.
>
> 3. Please provide any information that requires Federal employees who work on Federal

installations to comply with the State law requirement.

On August 4, 2000, TSgt. Lakenau responded to Mr. Woods' letter as follows:

> In response to your letter dated July 21, 2003, provided below is the information you requested.
>
> The law that precipitated the change in contract language requiring the Division of Military and Naval Affairs to prohibit smoking in all facilities under its control is Assemble Bill A7136, signed into law by Governor Pataki on 26 March 2003. A copy of the legislation is enclosed.
>
> The legislation amends Article 13-E of the Public Health Law by prohibiting smoking in any place of employment. Employer is defined as "any person . . . which employs one or more persons, including the . . . executive and judicial branches of state government and any political subdivision thereof."
>
> As you are aware, the Division of Military and Naval Affairs (DMNA) and the New York National Guard are part of the executive branch of New York State government. Accordingly, we are obligated to follow and enforce state law in any facility under the Adjutant General's (TAG) control, including our air bases. Additionally, the employees at all our facilities are under TAG control, making him, and the DMNA, an employer under the definition provided above. Nowhere is this fact more clear than in the

language of our Collective Bargaining Agreement itself, which is negotiated between the DMNA as the employer, and the Association of Civilian Technicians (ACT).

As to your request for information regarding "Federal" versus "State" facilities. All facilities of the New York Air and Army National Guard are under the control of TAG and the DMNA. Some of those facilities are, however, located on federally owned or leased property. Assuming this is what you intended in differentiating between "federal" versus "state" facilities, attached is a list of DMNA facilities that are "federal" and "state."

Finally, you requested "any information that requires Federal employees who work on Federal installations to comply with the State Law requirement." The current smoking policy is as much an issue about the employer complying with the state law as it is employee compliance. As discussed above, the law prohibits an employer from allowing smoking in any facility under its control. It is our position that this law is binding on us as an executive agency and we must comply by banning smoking in any facility under our control.

In addition to the state law requiring us to ban smoking in facilities under our control, there is also DOD guidance regarding smoking in indoor work areas. As you are aware, DOD Instruction 1010.15, Executive order 13058, and 41 CFR 101-20 prohibit smoking in indoor work areas. Granted, these policies may not extend

> to "nonfederal governmental units that serve as the permanent or intermittent duty station of one or more Federal employees." As DMNA is a nonfederal governmental unit, there is an argument to be made that the DOD instructions do not apply. Regardless, the DOD Instruction, Executive Order, and 41 CFR 101-20 are provided, for your information.

On August 18, 2003, Mr. Woods reiterated the Union's position:

> This letter is in response to your letter dated August 4, 2003 as it pertains to the smoking policy change proposed by the Adjutant General.
>
> After reviewing the Code of Federal Regulations (title 41, volume 2), the Executive Order (13058) and the Department of Defense Instruction (1010.15), it is clear that the language that we have in the existing Negotiated Agreement will meet the intent of the law. Furthermore, the State law does not apply to federal facilities.
>
> Please advise the New York State Council of ACT if you want to open the Contract to renegotiate the current smoking policy.

The Union and the NYSDMNA exchanged subsequent correspondence regarding the newly implemented policy, and met to discuss their differing views on the matter. However, the grievance remained unresolved. It was processed in accordance with Article 27 of the Agreement between the parties. Accordingly, it is properly before me for resolution.

POSITIONS OF THE PARTIES

The following positions of the Parties are condensed and extrapolated from their respective pre-hearing briefs.

Union. At the outset, the union maintains that, under the federal collective bargaining law, the circumstances in which federal employees are allowed to smoke at work are negotiable conditions of employment. *See AFGE National Veterans Administration Council*, 40 FLRA 1052 (1991). Where federal employees are represented by a union, it is an unfair labor practice for an agency to change employee working conditions without (a) notifying the union in advance, (b) affording the union opportunity to bargain over the proposed change, and (c) maintaining the status quo until bargaining is completed. *Department of Health and Human Services, Social Security Administration*, 33 FLRA 454, 458 (1988); *Department of Justice, Immigration and Naturalization Service and AFGE, National Board Patrol Council*, 31 FLRA 145 (1988).

The union asserts that it is also an unfair labor practice for an agency clearly and patently to breach a collective bargaining agreement. *Department of the Air Force, Robins AFB and AFGE Local 987*, 52 FLRA 225 (1966) (agency's change in smoking policy was unfair labor practice because it clearly and patently breached collective bargaining agreement requiring negotiation of changes in smoking policy). It points out that Article 6, Section 4 of the parties' collective

bargaining agreement (*supra*) requires local negotiation of smoking rules; and Article 7 requires state level negotiation of any problem not solved at the local level.

The union contends that the agency's unilateral implementation of its July 23, 2003 policy imposing a statewide ban on any indoor smoking by federal employees and its refusal to rescind the policy violated Article 6, Section 4 and Article 7 of the parties' collective bargaining agreement. In addition, it insists the agency's action was an unfair labor practice—both because it was a unilateral change in working conditions without notice, opportunity to bargain, and preservation of the status quo pending completion of bargaining, and because it was a clear and patent breach of Article 6, Section 4 of the collective bargaining agreement.

It is the position of the Union that the agency's assertion that its actions were required by state law is not a defense to the union's grievance. State law doe not trump federal law. On the contrary, federal law trumps state law. In *NAGE Local RI-203 and Department of the Interior, Fish and Wildlife Service*, 55 FLRA No. 176 (1999), the union asserted that it could by negotiated agreement require the agency to comply with state law when the agency exercised its federal right to discipline employees. The Federal Labor Relations Authority rejected this argument, holding that state law was not an "applicable law" restraining management's federal right.

The exercise of management's rights under section 7106(a)(2) of the Statute is limited by "applicable laws." *See National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service*, 42 FLRA 377, 388-91 (1991), *enforcement denied on other grounds*, 966 F.2d 1246 (D.C. Cir. 1993). Proposals that require an agency to exercise its management's rights in accordance with applicable laws are within the duty to bargain. The Union's claim that the proposal requires the Agency to comply with section 99 is tantamount to a claim that section 99 constitutes an "applicable law" limiting management's right under section 7106(a)(2)(A) to determine its investigative techniques. The issue presented by the Union's claim is whether a Federal agency's choice of investigative techniques pursuant to its right to discipline employees under section 7106(a)(2)(A) of the Statute may be subjected to state law.

The relation between Federal and state law is governed by the Supremacy Clause of the United States Constitution, Article VI, clause 2, which provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding." Additionally, "[a] corollary to [the Supremacy Clause] is that the activities of the Federal Government are free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943). Further, it is "well settled" that the activities of Federal instrumentalities are

"shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation. *Goodyear Atomic Corporation v. Miller*, 486 U.S. 174, 180 (1988). *See also McFalls v. Office of Personnel Management*, 72 MSPR 252, 261 (1996) (the Merit Systems Protection Board (MSPB) "is a Federal administrative tribunal established to adjudicate claims arising under applicable Federal statutes and regulations . . . . Therefore, it generally must follow Federal law, rather than state law.")

The Union cites no Federal statute clearly and unambiguously authorizing state regulation of telephone surveillance conducted by Federal agencies. Under the Supremacy Clause, therefore, section 99 would not apply to the recording of telephone conversations as provided by Proposal 3. For that reason, section 99 is not an "applicable law" that limits management's choice of investigative techniques pursuant to its right to discipline employees under section 7106(a)(2)(A) of the Statute.

The union concludes that there is no federal law that clearly and unambiguously authorizes state regulation of any federal employee working conditions, let alone the specific matter of smoking policies. This being the case, the agency's federal obligations under the federal unfair labor statutes, and its federal obligations under the collective bargaining contract authorized by federal law, are higher law than the state indoor smoking ban. Accordingly, the Union argues that the grievance

be sustained and that the Agency be ordered to rescind its July 23, 2003 smoking policy.

Agency. It is the agency position that the subject Policy Letter is not subject to negotiation as it implements a mandate to the agency under law, which implementation is essentially nondiscretionary in nature. Additionally, it is the agency's position that all facilities under DMNA control are subject to state law and that all NY National Guard military and naval facilities, whether owned or licensed to the State of New York, are under the control of the DMNA.

The Agency points out that, as stated in NY Executive Law, Section 190, the DMNA is part of the executive department of the State of New York and "shall include the organized militia; the state reserve list; the state retired reserve list; all offices, headquarters, units, forces, commands, arsenals, depots, armories, bureaus, agencies, bases, camps, ranges, and other military (including air) and naval facilities of the state and all military (including air), naval and civilian personnel who may be serving or employed therein." It points out further that New York Executive Law, section 190 (*supra*) provides that ". . . the head of the division of military and naval affairs shall be the adjutant general. The governor may exercise and perform his functions, powers and duties as commander-in-chief of the militia of the state in whole or in part through such division." Moreover, Military Law Section 2, subsection 1 provides that "the organized militia shall be composed of the New York Army National Guard; the New York Air National Guard . . . " As provided in the Collective Bargaining

Agreement, the DMNA is the employer in this case, the agreement itself is executed by the Adjutant General, a state officer.

The Agency notes that it is a unique employer as it employs several categories of employees, including purely state employees, Active Guard/Reservists, Traditional Guardsmen and Dual Status Military Technicians which are, nominally, federal employees. ACT represents these military technicians in bringing the current grievance. It suggests that to adequately analyze the current case an understanding of the technician program and the relationship of technicians to the Adjutant General is necessary.

As stated by the United States Court of Appeals for the D.C. Circuit in *American Federation of Government Employees v. FLRA*, 730 F.2d 1534,

> The government in general and the National Guard in particular cannot be easily analogized to private sector firms dealing with employees. Neither can national guardsmen be easily analogized to other federal employees because, except for federal benefits and tort claims coverage, it was the intent of Congress in the 1968 Technician Act that they ***be the equivalent of state employees*** subject to employment, supervision and control by the state adjutants general. *Id.* at 1536 (emphasis added).

The court of appeals went on to state,

> It thus appears that the scheme of the act is to create the technicians as ***nominal federal employees for a very limited purpose*** and to recognize the military authority of the states through their Governors and Adjutants General to employ, command, and discharge them. The employment, discipline, and discharge of technicians remains completely with the state officials, and their day to day activities on the job are controlled at the state level. *Id.* at 1538 (emphasis added).

A review of the legislative history of the Technician Act of 1968 similarly reveals the employment relationship to the states. Senator Stennis, the sponsor and floor manager of the bill, noted,

> Mr. President, I shall now discuss the statutory controls which the committee felt were essential in order to recognize the military requirements and ***state characteristics of the National Guard.*** The underlying premise of these controls ***which would supersede the normal civil service rules and regulations*** is the fact that ***the National Guard*** until it is called into active Federal service ***is a state organization subject to the sole command and control of the Governor concerned. It is essential that the technicians who constitute only about 8% of the total National Guard force be subject to the same rules as the remaining National Guard elements.*** 114 Cong. Rec. 12,251 (June 19, 1968) (emphasis added).

Similarly, the Agency points out, in evaluating a consolidation petition brought by ACT, the FLRA has noted,

> The state adjutants general have a role in labor relations.
>
> The petitioner's view ignores both the hybrid nature of technician employment and the significance of the command in section 709(c) of the Act, that the "Secretary concerned shall designate the adjutant general to employ and administer the technicians . . . " The Senate report on the legislation that became the Technicians Act explains that a "principal feature" of the Act is the "[r]equirement for adjutants general to be the sole agent for employment and administration of [the] technician program under regulations prescribed by the Secretary concerned." S.R. Rep. No. 1446 at 2, 90th Cong. 2nd Sess. (1968) (emphasis added). . . . *DoD, National Guard Bureau and ACT*, 55 FLRA 657, citing *American Federation of Government Employees, AFL-CIO, Local 2953 v. FLRA*, 730 F.2d 1534, 1537-38 (D.C. Cir. 1984); *see also Johnson v. Orr*, 780 F.2d 386, 392 (3rd Cir. 1986).

Thus, the Agency asserts, the case law and legislative history are clear: National Guard technicians are nominal federal employees who are employed by the Governors and Adjutants General of their respective states. It insists that it is with this in mind that the case must be analyzed.

In addition, the Agency disputes the Union's contention that, in this matter, it has a duty to

bargain. It notes that 5 U.S.C. § 7117 (a) (2) provides: "(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation."

In determining whether a compelling need exists, the FLRA has promulgated regulations which establish standards to be applied in determining whether any agency regulation satisfies the "compelling need" criteria and is thus exempt from the duty to bargain. These standards are set out in 5 C.F.R. § 2424.11 which provides, in part,

> A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:
>
> (c) ***The rule or regulation implements a mandate to the agency*** or primary national subdivision under law or other outside authority, ***which implementation is essentially nondiscretionary in nature*** (emphasis added).

In *American Federation of Government Employees v. FLRA*, 730 F.2d 1534 the court stated,

> The Act clearly provides that the duty to bargain does not extend to agency-wide rules for which a "compelling need" exists as determined by FLRA regulations. 5 U.S. C. § 7117 (a) (2). This limit on the duty of an agency to bargain recognizes that within every agency there exists a governmental mission which may not be compromised or negotiated away, in whole or in part, at the bargaining table. *Id.* at 1539.

The court went on to specifically state,

> ***In this case it should also be recognized that the personnel here are only nominal federal employees*** and that the subject bargaining proposal is directed at a facet of the employees' status that is not within the federal orbit but is instead completely within those aspects of the Guard's technician status that is completely subject to state authority. *Id.* (emphasis added).

The Agency maintains that in the present case, the DMNA is a state executive agency subject to the laws of the State of New York. In March of 2003, the NY State Legislature amended NY Public Health Law prohibiting smoking in any place of employment. Specifically, section 1399-o states, "Smoking Restrictions: Smoking shall not be permitted and no person shall smoke in the following indoor areas: 1. places of employment; . . . ."

Section 1399-n defines "Places of employment" as "any indoor area or portion thereof **under the control of an employer** in which employees of the employer perform services, and shall include, but not be limited to, offices, school grounds, retail stores, banquet facilities, theaters, food stores, banks, financial institutions, factories, warehouses, employee cafeterias, lounges, auditoriums, gymnasiums, restrooms, elevators, hallways, museums, libraries, bowling establishments, employee medical facilities, rooms or areas containing photocopying equipment or other office equipment used in common, and company vehicles." (emphasis added)

Section 1399-n also defines "Employer" as "any person . . . or entity which employs one or more persons, including the legislative, **executive** and judicial **branches of state government and any political subdivision of the state.**" (Emphasis added). Based upon the clear language of the statute, the Governor of the State of New York issued guidance to all state agencies, including the DMNA, that, effective July 24, 2003, smoking was prohibited in any indoor work area. The guidance specifically stated, "no appointing authority or designee shall have the discretion to authorize or negotiate any variance in the law." Thus, the Agency contends, based upon this clear and unequivocal guidance, the Adjutant General followed the commands of the Commander-in-chief and implemented the state law regarding smoking in the work place. The Adjutant General had no discretion to negotiate any variance to this statutory requirement.

As stated above, 5 U.S. C. § 7117 (a) (2) provides that "the duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any government-wide rule or regulation, extend to matters which are the subject of any agency rules or regulation referred to in paragraph (3) of this subsection **only if the authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.**

In this case the authority has not determined that no compelling need exists for the change in the smoking policy. Applying the FLRA's standards under 5 C.F.R. § 2424.11, "A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that . . . ***the rule or regulation implements a mandate to the agency*** . . . under law or other outside authority, ***which implementation is essentially nondiscretionary in nature.***"

As stated above, the act of implementing state law in this case was "***essentially nondiscretionary in nature***" and was mandated to the DMNA under law.

The Agency dismisses the Union's protest that "this issue is negotiable since many of the Agency's facilities are DoD facilities and do not fall under the jurisdiction of NY State Law." Rather, the Agency maintains, NY Public Health Law applies to all facilities under DMNA control. The state law

does not differentiate between ownership of property and the applicability of the law. Rather it applies to employers and places of employment. Clearly the DMNA is a covered employer under the statute which defines employer as "any person . . . or entity which employs one or more persons, including the legislative, executive, and judicial branches of state government and any political subdivision of the state." DMNA is part of the executive branch of state government.

Similarly, a "Place of employment" is any indoor area or portion thereof **under the control of an employer** . . . ." All DMNA facilities are under the control of TAG and DMNA. As stated in section 190 of the Executive Law, DMNA "shall include . . . arsenals, depots, armories, bureaus, agencies, bases, camps, ranges and other military (including air) and naval facilities of the state and all military (including air) and naval and civilian personnel who may be serving or employed therein."

As to the argument that ACT appears to be proffering that NY Air National Guard bases are "federal property" and are not "facilities of the state," the Agency counters that all federally owned or leased property utilized by the NY National Guard is utilized under a license from the federal government to the State of New York for the express purpose of administering the State National Guard. Though the federal government may own or lease several facilities, they are all licensed to the State of New York and under State control as dictated in NY Executive law.

The Agency concludes that the Smoking Policy Letter is not subject to negotiation as it involves the implementation of a mandate under law, which implementation is essentially nondiscretionary in nature. All facilities under DMNA control are subject to state law and all NY National Guard military and naval facilities, whether owned or licensed to the State of New York, are under the control of the DMNA. Accordingly, the Smoking Policy Letter, which merely implements state law, is not subject to negotiation.

OPINION OF THE ARBITRATOR

At the heart of this case is a dispute over the interpretation and application of the language of the Parties' Collective Bargaining Agreement. Complicating the matter is the somewhat complex interrelationship among the Agency, the State and Federal Department of Defense (DoD). This is well illustrated by the initial paragraph of New York State Military Law §182, Paragraph 1. As noted above, that paragraph provides that all "facilities owned, leased or maintained by the State or by the United States for the use of the organized militia . . . shall be under the general charge and control of . . . the adjutant general [of New York State]." More specifically, New York State Executive Law §190, Paragraph 1, states, "the head of the division of military and naval affairs shall be the adjutant general who shall be appointed by the governor . . . ." Also apparent from that provision is that the adjutant general is directly responsible to, and must comply with the directives of, the Governor of the State of New York. Section 190 further provides, "The governor may exercise and perform

his functions powers and duties as commander-in-chief of the militia of the state in whole or in part through such division . . . ."

The Union has contended that the only applicable law relevant to the Civilian Technicians it represents is the Federal Law. Accordingly, it argues, the DMNA must be governed in its relationship with ACT by the language in Section 7 of EO 13058, in particular where it states, "Provisions of existing collective bargaining agreements shall be honored and agencies shall consult with employee labor representatives about the implementation of this order." Thus, the Union maintains, the Agency is obliged, under Article 6, §7 of the Collective Bargaining Agreement to "negotiate over the rules governing employees smoking."

It is the Union's position that since the employees it represents are federal employees, smoking restrictions applied to them must be in compliance only with federal rules and regulations, not with State promulgated rules. For example, they point out that federal regulations allow indoor smoking in "designated smoking areas that are enclosed and exhausted directly to the outside and away from air intake ducts and . . . maintained under negative pressure (with respect to surrounding spaces) sufficient to contain tobacco smoke within the designated area." (41 C.F.R. §101-20.105-3(b).

As is clear from the evidence on this record, the building facilities and property occupied by the DMNA are under the control of the Agency and,

therefore, are under the direction of the Adjutant General of the State of New York. The Agency provided numerous uncontested documents supporting their argument that the Agency holds licenses from the Federal government for their various facilities across New York State. Among the provisions in the licenses is the clause recently entitled "Supervision by the Installation Commander" which appears in the form or substance in each such license issued within the last decade. That clause reads as follows:

> The use and occupancy of the premises shall be without cost to the regular establishment of the military departments of the Department of Defense and shall be under the general supervision of the Installation Commander . . . and subject to such rules and regulations as may be prescribed from time to time by said officer.

Thus, the license conveys authority to make rules and regulations from the DoD to the Installation Commander.

Also, as noted above, the Installation Commander is ultimately responsible to the Adjutant General of the State of New York, who in turn is directly responsible to the Governor, as Commander-in-chief. As further indication of this conveyance, each license provides that the licensee must:

> . . . comply with any [environmental protection] laws, regulations, conditions or instructions affecting the activity hereby authorized if and when issued by the Environmental Protection

> Agency, or any Federal, State, Interstate or local governmental agency having jurisdiction to abate or prevent pollution.

Thus, for example, if the town of Latham were to pass a law mandating recycling of all used motor oil at a Town designated facility, the Agency would be obliged under the provisions of its licensing agreement with the DoD to comply with the Town law.

Further evidence of the intended accession to regulations set by other than Federal entities appears in the original Executive Order 13058. In Section 2, paragraphs (c) and (d), the Order specifically provides as follows:

> (c) The order does not extend to those portions of federally owned buildings leased, rented, or otherwise provided in their entirety to nonfederal parties.
>
> (d) The order does not extend to places of employment in the private sector or in other nonfederal governmental units that serve as the permanent or intermittent duty station of one or more Federal employees.

Thus, for example, if an attorney from the Judge Advocate General's staff were temporarily assigned to a private law firm or municipal department of law, he or she would be obliged to comply with local regulations regarding restriction of smoking, even if they were, as here, more stringent than those the JAG attorney was subject to within a federal facility.

The Union also seeks support in the language of the Collective Bargaining Agreement, specifically at Article 6, Section 4, and Article 7, Section 3 (both reproduced in full above). It asserts that Section 4 of Article 6 requires the Agency to negotiate the smoking policy during normal contract negotiations and obligates the Agency to negotiate any subsequent changes to that policy. However, there is an implicit proviso within Section 4 that limits the Parties' latitude to negotiate employee-smoking rules. The final phrase of Section 4 provides that the Parties' may negotiate such rules "within the purview of The Adjutant General's DMNA smoking policy letter." The Adjutant General's Memorandum confirms the change in smoking policy with DMNA facilities. Echoing the June 4, 2003 memorandum from the OER Deputy Director, Maj. Gen. Maguire's memorandum states:

> 3. The amendment to the New York State Public Health Law, effective 24 July 2003, prohibits all smoking in National Guard Facilities occupied by the New York Army and Air National Guard and civilian employees. Designated smoking areas must be located outdoors and not in the immediate proximity of entrances. This policy will provide consistency throughout the state.

The Adjutant General's memorandum perforce acknowledges removal of discretion over smoking policy from the purview of the DMNA, in that it specifically refers to mandatory DMNA compliance with the New York State Public Health Law that became effective 24 July 2003. That directive as well removes the matter from the language of Sections 2 and 3 of Article 7. In both those

provisions, the limitation on consultation is that the matter be "within the purview of the DMNA." Thus, the Agency is not bound, nor does it have authority to, negotiate with the Union over the revised DMNA smoking policy promulgated to bring it in compliance with the New York State Adjutant General's directive.

In light of the foregoing I find that the Agency did not violate the Collective Bargaining Agreement when it issued a new smoking policy letter on 23 July 2003. Thus the grievance must be denied.

AWARD

The Agency did not violate the Collective Bargaining Agreement when it issued a new smoking policy letter on 23 July 2003.

/s/

Elizabeth C. Wesman, Ph.D.

Signed: 19 July 2004

APPENDIX E

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1354 **September Term, 2007**
Filed On: Jan 18 2008

Association of Civilian Technicians, New York State Council,

Petitioner

v.

Federal Labor Relations Authority,

Respondent

BEFORE: Sentelle, Tatel,* and Griffith, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing filed December 10, 2007, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

*Circuit Judge Tatel would grant the petition for rehearing.

APPENDIX F

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-1354 **September Term, 2007**
Filed On: Jan 18 2008

Association of Civilian Technicians, New York State Council,

Petitioner

v.

Federal Labor Relations Authority,

Respondent

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk